DOCKET FILE COPY ORIGINAL

JSI John Staurulakis INCORPORATED

6315 Seabrook Road Seabrook, Maryland 20706
phone 301-459-7590, fax 301-577-5575
internet. www.jsitel.com, e-mail: jsi@jsitel.com

RECEIVED

NOV 2 1 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 21, 2003

96-128

BY HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
c/o Visitronix, Inc.
236 Massachusetts Avenue, N E.
Suite 110
Washington, D C. 20002

Re. BEK Communications Cooperative (North Dakota)
Petition for Waiver of Default Payphone Compensation Requirements
Under Sections 64.1301(a),(d) and (e).

Please find enclosed for filing the original and 4 copies of BEK Telecommunications Cooperative's Petition for Waiver of Sections 64.1301(a), (d) and (e) as delivered by their consultant, John Staurulakis, Inc (JSI).

JSI is also presenting a "Stamp and Return" copy for stamping by the FCC's representative and return to JSI at time of hand delivery.

The filing is made by BEK Telecommunications Cooperative and signed by its General Manager, Mr Jerome Tishmack. Should you have any questions regarding this matter, please call Mr. Tishmack at 701-475-2361.

Sincerely,

Scott L Duncan

Scott Duncan
Consultant for BEK Communications Cooperative
John Staurulakis, Inc.

No. of Copies rec'd 0+4
List ABCDE

RECEIVED

NOV 2 1 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Pay Telephone Reclassification and	)	CC Docket No. 96-128
Compensation Provisions of the	)	
Telecommunications Act of 1996	)	

PETITION FOR WAIVER OF SECTIONS 64.1301(a), (d) AND (e)

BEK Communications Cooperative ("BEK"), pursuant to Section 1.3 of the Federal Communications Commission's ("FCC" or "Commission") Rules[1], herby requests a waiver of Sections 64.1301(a), 64.1301(d) and 64.1301(e) of the Commission's Rules[2] to exclude BEK from the requirement to pay default compensation to payphone service providers. Because BEK is an ILEC, BEK is included among the universal group of ILECs subject to Section 64.1301 by inclusion of "ILEC" on Appendices A, B and C of the Commission's *Fifth Reconsideration Order* in CC Docket No. 96-128[3], BEK is currently subject to the requirement to pay default compensation to payphone providers for compensable calls. Because BEK does not carry compensable calls, BEK respectfully requests that the Commission waive the requirement under

[1] 47 C F R. § 1 3
[2] 47 C F R §§ 64 1301(a), 64 1301(d) and 64 1301(e)
[3] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No 96-128, *Fifth Order on Reconsideration and Order on Remand*, FCC 02-292 (Rel Oct 23, 2002) (*Fifth Reconsideration Order*)

Sections 64.1301(a), 64.1301(d) and 64.1301(e) of the Commission's Rules for BEK to make default payments to payphone service providers.

BEK is an incumbent local exchange carrier (ILEC) serving approximately 5,800 customers in rural North Dakota. On August 29th, 2003, BEK received a letter and invoice from APCC Services, Inc. ("APCC"). Said letter indicates that APCC is rendering an invoice to BEK for payphone compensation owed to the payphone service providers ("PSPs") pursuant to the Commission's "True-Up Order" (*Fifth Reconsideration Order*).

1. A key determination by Commission regarding compensable calls is that an ILEC must carry a call in order to be responsible for payment.

The *Fifth Reconsideration Order* was intended to bring a "measure of finality" regarding the contentious history of payphone compensation. One purpose of the Commission's action was to ensure that payphone service providers (PSPs) receive fair compensation for every call made using their payphones. The Commission has concluded that Section 276 requires it to "ensure that per-call compensation is fair, which implies fairness to both sides."[4]

In pursuit of this objective and a fundamental criterion to the Commission's rules regarding payphone compensation was to ensure that local exchange carriers ("LECs") "pay payphone compensation <u>to the extent that they handle compensable payphone calls</u>."[5] This is a threshold criterion that must be satisfied prior to placing a burden for PSP payment on any LEC. Absent satisfying this threshold criterion, a carrier would be

---

4 *Fifth Reconsideration Order*, at 82

5 *Id*, at 55 (Emphasis supplied)

responsible to pay for a compensable call that it did not handle. Clearly such result would not be a fair result for the LEC.

The Commission explained how a LEC can handle compensable communications.

a. When a LEC terminates a compensable call that is both originated within its own service territory and not routed to another carrier for completion,

b. When a LEC also provides interexchange service and carries the call as would any other IXC.

2. The Commission's default payphone compensation regime for ILECs is based exclusively on RBOC data that does not reflect BEK's lack of compensable calls.

Based on at least two data requests initiated by the Commission and directed solely to the RBOCs, the Commission determined that incumbent LECs complete payphone calls that are not routed to other carriers. The RBOC data apparently shows that 2.19 percent of all compensable payphone calls are handled by the RBOCs. The Commission also noted that no other incumbent LEC objected to this data. The Commission concluded that it is appropriate to allocate to "both RBOC and non-RBOC incumbent LECs a percentage of the calls (2.19%) originating from payphones within their own service territories." BEK did not have cause to object to this data because clearly the Commission was directing its efforts at determining the percentage for "carriers" – those entities who carry compensable communications. As will be shown below, BEK does not carry any compensable calls. Thus the application of the allocation percentage in the case of BEK is inappropriate.

3. BEK never carries compensable calls.

A compensable call is defined by the Commission as a call from a payphone user who calls a toll-free number, dials an access code, or uses a pre-paid calling card without placing any money into the payphone.[6] Because of its operation as an access provider, BEK does carry any compensable communications. All compensable calls originating from payphones within the BEK service area are passed on to other carriers who pay interstate or intrastate, as the case may be, originating access charges. Any compensable calls terminated by BEK within its service area are received from other carriers who pay interstate or intrastate, as the case may be, terminating access charges. Thus, BEK does not carry individual compensable calls that both originate and terminate within BEK's LEC service area or are carried by BEK as an IXC that are subject to compensation under the criteria established in the *Fifth Reconsideration Order* for either a LEC or an IXC.[7] Any compensable call terminating in BEK's service area would have to be an IXC-carried call. Assuming that BEK handles compensable calls and requiring it to pay for compensable calls that it never handles is not a fair compensation mechanism.

4. The Fifth Reconsideration Order provides a mechanism for entities to be removed from the allocation percentage appendices.

Appendices A, B and C of the *Fifth Reconsideration Order* list "carrier" allocation percentages for default compensation factors for, respectively, interim access code and subscriber 800 calls (November 7, 1996 through October 6, 1997), intermediate access code and subscriber 800 calls (October 7, 1997 through April 20, 1999) and post-

---

6 *Fifth Reconsideration Order*, at 3
7 *Id*., at 55

intermediate access code and subscriber 800 calls (April 21, 1999 forward). In the *Fifth Reconsideration Order*, the Commission noted that entities listed on Appendices A, B, or C could file a petition for a waiver with the Wireline Competition Bureau – such as the instant waiver request – for exclusion from the Commission's allocation. Note 89 states:

> … Any entity named in our allocation that then receives a request for per payphone compensation from a PSP or other entity may, within ninety (90) days of receiving such a request, file a waiver request with the Wireline Competition Bureau for exclusion from our allocation, with a demonstration that the entity provides no communications service to others.[8]

As has been demonstrated above, while BEK provides communications services, it never provides compensable communications service to others and is a non-carrier as defined by the *Fifth Reconsideration Order*.[9] Accordingly, BEK requests within 90 days of receipt of its only request for compensation, that from APCC, that it be removed from the Commission's allocation appendices.

5. **BEK's petition for waiver meets the Commission's standards for granting a waiver of its rules.**

Under section 1.3 of the Commission's Rules, any provision of the rules may be waived if "good cause" is shown. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question.[10] Payment of payphone compensation by BEK absent compensable calls that both originate and terminate within BEK's network, whereby BEK does not collect any revenue for the call, apart from revenue under the applicable

---

8 *Fifth Reconsideration Order*, Note 89

9 *Id*, Note 3

10 Wait Radio v. FCC, 418 F 2d 1153 (D C Cir 1969), cert denied, 409 U S. 1027 (1972) ("WAIT Radio"), Northeast Cellular Telephone Co v FCC, 897 F 2d 1164, 1166 (D C Cir 1990)

interstate or intrastate access charge regime, would be inconsistent with the public interest. Additionally, payment of compensation under such circumstances would undermine the policy that entities benefiting from the carrying of compensable payphone originating calls should pay compensation to payphone providers. Moreover, it would be burdensome and inequitable for BEK and, in turn, its customers to bear the cost of default payment compensation when BEK carries no compensable calls.[11]

CONCLUSION

For the foregoing reasons, BEK respectfully requests that the Commission waive Sections 64.1301(a), 64.1301(d) and 64.1301(e) and thereby not include BEK among the entities listed on Appendices A, B and C of the *Fifth Reconsideration Order* required to pay default compensation to payphone service providers. The requested waiver will serve the public interest by allowing BEK to avoid payment of charges for which no related benefit accrues to BEK given that BEK does not carry payphone originated compensable calls.

Respectfully submitted,

BEK Communications Cooperative

By: Jerome Tishmack

Jerome Tishmack
General Manager
P.O. Box 230
Steele, North Dakota 58482-0230
701-475-2361

November 21, 2003

[11] *See* Wait Radio, 418 F.2d at 1159. The petitioner must demonstrate, in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest.

DECLARATION OF JEROME TISHMACK

I, Jerome Tishmack, General Manager of BEK Communications Cooperative in North Dakota do hereby declare under penalties of perjury that the information contained in the foregoing "Petition for Waiver" is true and accurate to the best of my knowledge, information and belief.

Jerome Tishmack
General Manager
BEK Communications Cooperative
P.O. Box 230
Steele, North Dakota 58482-0230
701-475-2361

Date: November 21, 2003